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No. 73-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
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MICHAEL

ADELE BORSERINE,

Petitioner

v.

THE STATE OF FLORIDA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

FRANK RAGANO
Roberts Building
28 W. Flagler Street
Miami, Florida 33130
Attorney for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No._____

ADELE BORSERINE,

Petitioner

v.

THE STATE OF FLORIDA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, ADELE BORSERINE, presents this her Petition for a Writ of Certiorari and states:

I.

Petitioner seeks to have reviewed a Decision of the District Court of Appeal of Florida, Third District, dated January 22, 1973 (App. p. A-1) and its Order Denying Petitioner's Petition for Rehearing dated February 26, 1973 (App. p. A-4), which were filed in the records of said Court on the said dates.

II.

This Petition is presented under and pursuant to Title 28, Sec. 2101 (d) and Rules 19 and 21 of the Supreme Court Rules.

III.

The question presented for review:

WHETHER PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION AS GUARANTEED TO HER BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE TRIAL JUDGE ADMITTED, OVER PETITIONER'S OBJECTIONS, THE TESTIMONY OF THE STATE'S KEY WITNESS THAT PETITIONER DID NOT OFFER ANY EXPLANATION AS TO HOW SHE CAME INTO POSSESSION OF THE GOODS WHICH ALLEGEDLY HAD BEEN RECENTLY STOLEN AND WHICH WERE FOUND IN HER POSSESSION AT TIME OF HER ARREST.

IV.

The constitutional provision involved in the case at Bar is the Fifth Amendment to the United States Constitution which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

V.

STATEMENT OF THE CASE

(a) On February 11th, 1972, a two count information was filed against the Petitioner charging her with breaking and entering a dwelling and grand larceny, respectively. The State did not offer any direct testimony that the Petitioner either broke and entered into the motel room in question or that she stole any personal property therefrom, but relied solely upon circumstantial evidence. During the course of the trial, the State's key witness, Detective Ralph Walker, was permitted, over Petitioner's objections, to give the following answers to questions propounded to him by the prosecuting attorney:

> "Q Did the defendant at any time offer any explanation for her possession—
>
> MR. RAGANO: I object to that.
>
> MR. DUBITSKY: Let me phrase the question at least before he makes the objection and then I think we can argue.
>
> Q (By Mr. Dubitsky) As to her possession of any of the property which you see before you in evidence?
>
> MR. DUBITSKY: (Court reporter mistake, should be Frank Ragano) I object to that, she is under no obligation to make any explanation at all."

After lengthy argument, the Court overruled Petitioner's objections and permitted the prosecuting attorney to ask the following question and Detective Walker to give the following answer:

"Q (By Mr. Dubitsky) Detective — pardon me — offered to you by the defendant as to how she came into possession of any property that was introduced into evidence?

A No, she didn't give any explanation.'"

(b) Detective Walker testified that at the time he took the Petitioner into custody, he advised her as follows:

"You have a right to remain silent. The Constitution requires that I so inform you of this right. And you need not talk to me if you do not wish to do so. You do not have to answer any of my questions.

Should you talk to me, anything which you might say in answer to my questions can and will be introduced in evidence in court against you.

If you want an attorney to be present at the time or any time hereafter, you are entitled to counsel. If you cannot afford to pay for such counsel, we will furnish you with counsel if you so desire.

Knowing your rights as I have just related them to you, are you now willing to answer my questions without having any attorney present?

Upon being so advised, the Petitioner indicated that she was willing to talk. However, other than saying: 'What's this all about? What's this all about,' she just remained silent."

(c) It is most respectfully submitted that the Trial Judge then compounded the constitutional error by charging the jury that when one is found in possession of recently stolen goods and does not offer an explanation as to how she came into possession of said stolen goods the presumption of guilt in such cases is

one in which the jury may infer as a matter of fact and is another circumstance the jury may consider in arriving at a verdict.

(d) In addition thereto, the prosecuting attorney, in his closing argument to the jury, relied heavily on the Petitioner's failure to offer any explanation as to how she came into possession of the alleged stolen goods which were found in her possession at the time of her arrest.

(e) The Petitioner argued at the time that she made her objection to the foregoing testimony that she was not under any obligation to offer any explanation on the grounds that it violated her right against self-incrimination as guaranteed to her by the Fifth Amendment to the United States Constitution. This Federal question was also raised by Petitioner in her Motion for New Trial; Assignments of Error; her Brief filed with the District Court of Appeal, Third District, State of Florida; her Petition for Rehearing (App. p. A-2); and her Petition for Writ of Certiorari which was filed with the Supreme Court of the State of Florida (App. p. A-5). In each instance the Courts of the State of Florida ruled against the Petitioner.

VI.

REASONS FOR GRANTING THE WRIT

(a) The Decision of the District Court of Appeal of Florida, Third District, in ruling that the Petitioner was not deprived of her right against self-incrimination, as guaranteed to her by the Fifth Amendment to the United States Constitution, when Detective Walker was allowed to testify, over Petitioner's objections, that she did not offer any explanation as to how she came

into possession of the goods which allegedly had been recently stolen and which were in her possession at the time of her arrest, is not in accord and is in direct conflict with the Decision of this Honorable Court in the case of *Miranda vs. Arizona,* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 wherein this Honorable Court clearly held in its Opinion that:

> "* * * it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of an accusation."* (Emphasis supplied.)"

(b) For some unknown reason the District Court of Appeal of Florida, Third District, did not apply the ruling of this Honorable Court in the *Miranda* case, *supra,* albeit the Florida Courts have consistently done so in the past, as shown by the case of *Breniser vs. State,* 267 So.2d 23 decided by the District Court of Appeal, Fourth District, State of Florida, wherein the Court held and reasoned as follows:

> "The state called as a witness the police officer who had arrested appellant. The officer testified that he first advised appellant of his constitutional rights, and then asked if he wanted to say anything, to which appellant replied, 'I don't believe so at this time'. The prosecutor followed this response with another question to the witness in the following form:
>
> So, the defendant requested or advised you that he did not wish to say anything to you?"
>
> to which question the witness replied in the affirmative. Further direct examination produced from the witness that he had read to appellant the

Miranda rights from a card which the officer carried, whereupon the prosecutor put a question in the following form:

'Would you just relate what you advised him before he said he wished not to talk to you?'

In response, the officer proceeded to itemize the several constitutional rights of which appellant was warned, reciting each in full and commenting after each to the effect that appellant had acknowledged his understanding thereof. The witness then made the following statement:

'I said, knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present? At this time, he stated, 'at this time, I don't believe I do'. In other words he didn't want to talk to me . . .'

At this point, defendant's counsel asked that the jury be removed, and then out of the presence of the jury moved the court to declare a mistrial on the basis of the repeated statements made by the witness concerning the appellant's having exercised his constitutional right to remain silent.

(1) There was no reason for the prosecution to introduce evidence of the fact that appellant had claimed his constitutional privilege of remaining silent after he had been taken into police custody. The average juror may well believe that as such a moment an accused who felt himself innocent would have no hesitancy in fully discussing the matter with the police, and conversely, an accused who elected to exercise the constitutional privilege 'had something to hide'. The United States Supreme Court made it clear in its decision in Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, that the prosecution may not use at trial evidence of the accused claiming the privilege to

remain silent. *In State v. Galasso,* Fla. 1968, 217 So. 2d 326, *our Supreme Court expressly approved the following language* of the opinion which Judge Reed authored for this court in the case of Galasso v. State, Fla. App. 1968, 207 So. 2d 45, at 48:

'The ruling in the Miranda decision to the effect that it is impermissible to penalize an individual who while in police custody exercises his privilege against self-incrimination by remaining silent, prohibits the admission of testimony relating to the silence of a defendant during the investigatory stages of a criminal case, even though the defendant later chooses to take the stand at the trial and testify in his own behalf, cf. Jones v. States, Fla. App. 1967, 200 So. 2d 574, 576.

To permit the use of such testimony would penalize the defendant for having remained silent at the investigatory stage because evidence of such silence tends to derogate his testimony at trial and also implies guilt.'" (Emphasis Supplied).

(c) It is most respectfully submitted that the foregoing fundamental error was compounded by the above-described charge given to the jury by the Trial Judge and the prosecutor's argument to the jury regarding the Petitioner's failure to offer any explanation as to how she came into possession of the alleged stolen goods at the time of her arrest. *This is particularly true since the Petitioner did not take the stand and testify at the trial of her case.*

(d) It is further respectfully submitted that under the circumstances in the case at Bar the Petitioner had a constitutional right (Fifth Amendment) to remain silent and the fact that she did so should not have been allowed to go before the jury. As was said in *McCarthy vs. United States,* 25 Fed. 2d 289, 299 (6th Cir.):

> "* * * to draw a derogatory inference from more silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.'"

(e) It is to be noted that Justice Richard Ervin dissented in the decision rendered by the Supreme Court of the State of Florida on May 14th, 1973 and that Justice Ervin was the Attorney General for the State of Florida for many years prior to the time that he became a Justice of the Supreme Court of Florida. (App. p. A-10).

WHEREFORE, Petitioner respectfully requests this Honorable Court to grant a Writ of Certiorari and enter its Order Quashing the Decision and Order hereby sought to be reviewed and grant such other and further relief as shall seem right and proper to this Honorable Court.

Respectfully submitted,

FRANK RAGANO
Roberts Bldg.
28 W. Flagler Street
Miami, Florida 33130

Attorney for Petitioner Adele Borserine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two printed copies of the foregoing Petition for Writ of Certiorari have been furnished to Arnold R. Ginsberg, Assistant Attorney General, State Office Building, 1350 N.W. 12th Avenue, Miami, Florida 33136, by first class mail, this 17th day of August, 1973.

FRANK RAGANO

APPENDIX

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1973

ADELE BORSERINE, *Appellant,*	:	
vs.	:	CASE NO. 72-825
THE STATE OF FLORIDA, *Appellee.*	:	

Opinion filed January 22, 1973.

An Appeal from the Criminal Court of Record for Dade County, Ellen Morphonios Rowe, Judge.

Ragano & LaPorte, for appellant.

Robert L. Shevin, Attorney General and Arnold R. Ginsberg, Assistant Attorney General, for appellee.
Before PEARSON, HENDRY and HAVERFIELD, JJ.

PER CURIAM.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1973

ADELE BORSERINE, *Appellant,*	:	
vs.	:	CASE NO. 72-825
THE STATE OF FLORIDA, *Appellee.*	:	

PETITION FOR REHEARING

COMES NOW, the Appellant, ADELE BORSERINE, by her undersigned counsel and pursuant to Rule 3.14, Florida Appellate Rules, and within the time provided therein, files this her Petition for Rehearing directed to this Honorable Court's Order and Decision dated January 22, 1973 and as grounds therefore would show:

1. That this Honorable Court must have overlooked and failed to consider its Opinion in the case of *Jones vs. State,* (Fla. 1967), 200 So.2d 574, wherein this Court considered the identical issue that was presented in the case at bar and ruled contrary to the decision rendered herein on January 22, 1973.

2. That this Honorable Court must have overlooked and failed to consider the fact that the Fifth Amendment to the Federal Constitution is applicable to the States.

3. That this Honorable Court must have overlooked and failed to consider the case of *Miranda vs. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, wherein the Supreme Court of the United States made it abundantly clear that:

"* * * it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of an accusation.*" (Emphasis supplied).

WHEREFORE, the Appellant prays that this Honorable Court will grant her Petition for Rehearing, withdraw its Order and Decision of January 22, 1973, and thereafter enter an Order fixing bail pending appeal in an amount not to exceed $25,000.

Respectfully submitted,

/s/ Frank Ragano

FRANK RAGANO
Suite 400 28 W. Flagler Street
Roberts Building
Miami, Florida 33130

Attorney for Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been furnished by first class mail to the Honorable Robert L. Shevin, Attorney General of the State of Florida, Attorney for Appellee, State Agency Building, 1350 N. W. Twelfth Avenue, Miami, Florida, this 5th day of February, 1963.

/s/ Frank Ragano

FRANK RAGANO

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1973
MONDAY, FEBRUARY 26, 1973

ADELE BORSERINE,	:	
Appellant,	:	
vs.	:	CASE NO. 72-825
THE STATE OF FLORIDA,	:	
Appellee.	:	

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: Frank Ragano
Arnold Ginsberg

/h

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43, 563

ADELE BORSERINE, Petitioner,
vs.
THE STATE OF FLORIDA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO HE DISTRICT COURT OF APPEAL, THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, ADELE BORSERINE, presents this, her Petition For Writ of Certiorari and states:

I.

Petitioner seeks to have reviewed a decision of the District Court of Appeal, Third District, dated the 22nd day of January, 1973, and filed in the records of said District Court on the 22nd day of January, 1973, in Minute Book 48, Page 107.

II.

This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution, and Rule 4.5 (c) of the Florida Appellate Rules.

III.

This Petition is accompanied by a transcript of so much of the proceedings as Petitioner seeks to have reviewed including the decision Petitioner seeks to have reviewed together with a certified copy of the pertinent portions of the Transcript of Testimony, which are made a part hereof by reference and marked for identification as Petitioner's Exhibit "I".

IV.

The following are the facts of the case:

(a) On February 11th, 1972, a two count information was filed against the Petitioner charging her with breaking and entering a dwelling and grand larceny, respectfully (TR. 18, 19). The Petitioner was found guilty of both counts of the information by a jury TR 20). Petitioner's Motion for New Trial was denied and on June 28, 1972, she was sentenced to serve a term of twelve (12) years imprisonment (TR. 20). On the same date, the Petitioner filed her Notice of Appeal (TR. 21), and on January 22nd, 1973, the District Court of Appeal, Third District, affirmed the judgment and conviction (TR. 24).

(b) During the course of the trial, the State's key witness, Detective Ralph Walker, was asked by the prosecuting attorney whether the Petitioner offered any explanation regarding her possession of recently stolen property at the time of her arrest (while in custody) and, over Petitioner's strenuous objections, the said witness was permitted to testify before the jury that she offered no explanation (TR. 1B, 2, 5, 6). After the State rested, the prosecuting attorney and counsel for the Petitioner entered into a stipulation which was read to the jury to the effect that the witness Walker would testify, if he were called as a witness, that at the time that he arrested the Petitioner he advised her that (TR. 15, 16):

"You have a right to remain silent. The Constitution requires that I so inform you of this right. And you need not talk to me if you do not wish to do so. You do not have to answer any of my questions."

(c) Over Petitioner's objections the Trial Judge charged the jury as follows (TR. 17):

"The unexplained possession of goods recently stolen from a building that has been broken into and entered may warrant the inference that the possessor not only stole the goods but also broke and entered the building with intent to steal. The guilt of the accused doesn't follow as a presumption of law from the unexplained possession of the property stolen. The presumption of guilt in such a case is one which you may infer as a matter of fact which you, the jury, are the sole judges of, and it is another circumstances which you may consider in connection with all the other facts and circumstances in the case which you believe to be true."

On the foregoing facts the Court was presented with the following point of law:

Whether the Trial Court erred in admitting into evidence, over Petitioner's objection, the testimony of Detective Ralph Walker to the effect that Petitioner did not offer any explanation as to how she came into possession of the goods which allegedly had been recently stolen and which were in her possession at the time of her arrest.

On this point of law, the District Court of Appeal, Third District, ruled as follows:

"That the foregoing testimony did not violate the Petitioner's rights against self-incrimination as guaranteed to her under the Fifth Amendment to the Federal Constitution as well as her rights under the State Constitution."

V.

The same point of law was involved in the case of *Breniser vs. State,* decided by the District Court of Appeal, Fourth District, on September 12, 1972. This decision was reported in *267 So. 2d 23* and a copy of the decision is attached to this Petition as Petitioner's Exhibit "II". The facts involved in *Breniser vs. State,* supra, were as follows:

> The Defendant was charged with second degree murder. He was convicted of manslaughter. During the course of the trial the State called as a witness the police officer who had arrested the Defendant. The officer testified that he first advised the defendant of his constitutional rights, and then asked if he wanted to say anything, and defendant stated, "I don't believe so at this time". The police officer was permitted to testify that the defendant didn't want to talk to him. In short, the defendant remained silent after being advised of his constitutional right to do so.

On these facts the District Court of Appeal, Fourth District, ruled as follows:

> There was no reason for the prosecution to introduce evidence of the fact that appellant had claimed his constitutional privilege of remaining silent after he had been taken into police custody. The average juror may well believe that at such a moment an accused who felt himself innocent would have no hesitance in fully discussing the matter with the police, and conversely, an accused who elected to exercise the constitutional privilege "had something to hide". The Court reversed judgment and remanded the case to the trial court for a new trial.

VI.

The decision of the District Court of Appeal, Third District, which Petitioner seeks to have reviewed is in direct conflict with the above-mentioned decision of the District Court of Appeal, Fourth District. Because of the reasons and authorities set forth in Petitioner's Brief, it is believed that the decision sought to be reviewed is erroneous and the conflicting decision of the District Court of Appeal, Fourth District, in the case of *Breniser vs. State,* supra, is correct and should be approved by this Court as the controlling law for the State of Florida.

WHEREFORE, Petitioner requests this Honorable Court to grant a Writ of Certiorari and enter its order quashing the decision and order hereby sought to be reviewed, approving the decision of the District Court of Appeal, Fourth District, as the correct decision and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

/s/ Frank Ragano

FRANK RAGANO
Attorney for Petitioner Adele Borserine
Suite 400, Robert Building
28 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the District Court of Appeal, Third District, was furnished by mail to the Honorable Robert L. Shevin, Attorney General of Florida, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, this 27th day of March, 1973.

/s/ Frank Ragano

FRANK RAGANO

SUPREME COURT OF FLORIDA
January Term, A.D. 1973
Monday, May 14, 1973

Case No 43,563

DISTRICT COURT OF APPEAL, THIRD DISTRICT
No. 72-825

ADELE BORSERINE, Petitioner,
vs.
THE STATE OF FLORIDA, Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.
Carlton, C. J., Roberts, Adkins and Delke, JJ., concur
Ervin, J., dissents

CC: Hon W. P. Carter, Clerk
Clerk, Criminal Court of Record
Hon. Ellen Morphonios Rowe, Judge
Hon. Frank Ragano
Hon. Reeves Bowen
Hon. Arnold R. Ginsberg

A True Copy
TEST:
Sid J. White
Clerk Supreme Court
By: Kay Dyert, D.C.